No. 21,337

In the United States Court of Appeals for the Ninth Circuit

THE VALLEY GROWERS, formerly known as THE VALLEY PACKING ASSOCIATION, a corporation, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION ISSUED FOLLOWING REMAND

SUPPLEMENTAL BRIEF AND APPENDIX FOR RESPONDENT

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In the United States Court of Appeals for the Ninth Circuit

No. 21,337

Tri Valley Growers, formerly known as Tri-Valley Packing Association, a corporation, Petitioner

v.

Federal Trade Commission, Respondent

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION ISSUED FOLLOWING REMAND

SUPPLEMENTAL BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUES

1. Whether the Commission, consistent with the remand directed by this Court in the prior review proceedings in No. 18,125, properly determined that the lower prices quoted by Tri Valley to certain favored purchasers were not in fact available to the unfavored purchasers as required by Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a).

2. Whether the Commission, consistent with the remand directed by this Court in No. 18,125, properly determined that petitioner has failed to show that its lower prices were meaning of Section 2(b) of the Clayton Act, as amended, made to meet equally low prices of competitors within the 15 U.S.C. § 13(b).

3. Whether the Commission, consistent not only with the remand directed by this Court in No. 18,125, but also the

decision of the Supreme Court in the related case of *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), and the Modified Final Decree subsequently issued by this Court in that case (No. 18,903), properly determined that Tri Valley has violated Section 2(d) of the Clayton Act, as amended, 15 U.S.C. § 13(d).

4. Whether the Commission's present cease and desist order, with the modification proposed below in light of the more recent decision of the Supreme Court in the related case of *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), and the Modified Final Decree subsequently issued by this Court in that case (No. 18,903), is reasonably related to the violations of law found to exist.

Upon the conclusion of the remand proceedings directed by this Court in No. 18,125, the Commission issued a cease and desist order which is somewhat narrower with respect to the Section 2(d) violations than the order against Tri Valley previously before the Court. Following the issuance of the present order and after the filing of the record herein, the Supreme Court issued its opinion in *Fred Meyer* and this Court thereafter issued its Modified Final Decree in that case. As the Commission has been without jurisdiction to modify its present order in conformity with that decision and this Court's Modified Final Decree in *Fred Meyer* because of the prior filing of the record herein, the Commission proposes that this Court modify paragraph 2 of the present order (by adding thereto certain language shown below in italics) so as to read as follows:

> 2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent, pursuant to a specially tailored or negotiated arrangement, as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers of respondent, *includ-*

ing customers who do not purchase directly from respondent, who compete in the distribution of such products with the favored customer.

The Commission has answered petitioner's contentions as to the asserted impropriety of the conduct of the administrative proceedings held after remand but believes such contentions to be entirely without substance and to present no issues for consideration by this Court.

COUNTERSTATEMENT OF THE CASE

The Nature Of The Case

This matter arises on a petition for review of an order to cease and desist issued by respondent, the Federal Trade Commission, against petitioner, Tri Valley Growers, a corporation (formery known as Tri-Valley Packing Association), hereinafter referred to as "Tri Valley." The order was issued following the holding of the remand proceedings directed by this Court in disposing of an earlier petition for review filed by petitioner in *Tri-Valley Packing Association* v. *Federal Trade Commission,* 9th Cir. No. 18,125.

The Commission's order challenged here, which is narrower in certain respects than the prior order set aside by the Court in No. 18,125, again directs Tri Valley to cease and desist from engaging in certain practices found by the Commission to be violative of Sections 2(a) and 2(d) of the Clayton Act, as amended, 15 U.S.C. §§ 13(a) and 13(d).[1] The practices proscribed involve Tri Valley's discrimination in prices and advertising allowances between competing buyers of its canned goods of like grade and quality.

The Court's opinion in the prior review proceedings in

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[1] The pertinent provisions of the amended Clayton Act are set forth at pp. 2-3 of the original brief filed by the Commission in the review proceedings held prior to the remand directed by this Court in *Tri-Valley Packing Association* v. *Federal Trade Commission,* No. 18,125. The respective jurisdictions of this Court and the Commission are noted at pp. 1-2 of that brief.

No. 18,125 is reported, *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F.2d 694 (9th Cir. 1964). There, this Court, while deciding numerous matters in the Commission's favor, remanded the case for further proceedings, stating in part (329 F.2d at 710):

> Any judicial review following the entry of the Commission's orders resulting from proceedings on remand may be upon the present record and briefs as appropriately supplemented.

The record herein reflects the proceedings held both before and after the remand directed by the Court.[2] Accordingly, and as permitted under the above-quoted direction of the Court, the instant brief is intended as a supplement to the brief which the Commission originally filed in No. 18,125.

The pleadings and the Commission's proceedings prior to remand

The two complaints issued by the Commission against petitioner Tri Valley (respondent in the Commission proceedings) and certain other pertinent pleadings in the consolidated adjudicative proceedings challenged here are described, together with record references, at pp. 1, 3-6 of the Commission's brief in No. 18,125.[3]

In general, the first complaint (issued in Docket No.

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[2] The proceedings of the Commission held *prior* to remand are contained at pp. 1-1560 of the reproduced transcript of record, while those held *subsequent* to the remand are contained at pp. 1561-2639. The entire record has been reproduced in 28 volumes, the first 18 volumes containing pp. 1-1560 (the proceedings prior to remand) and the remaining ten volumes containing pp. 1561-2639 (the proceedings subsequent to remand). Therefore, the references to the record in the Commission's brief in the prior review proceedings in No. 18,125 apply equally to the consolidated record filed in the instant proceedings of this Court. See the further explanation made in footnote 4, *infra,* of this brief with respect to the manner of reference by the Commission to the consolidated record.

[3] See also *In the Matter of Tri-Valley Packing Association,* 60 F.T.C. 1134 (1962), wherein the two complaints are set forth verbatim (at pp. 1134-1138).

7225) charges Tri Valley with violating Section 2(a) of the amended Clayton Act, 15 U.S.C. § 13(a), by discriminating in price between different purchasers of its products by selling these products to some of its purchasers at higher prices than it sells its products of like grade and quality to other purchasers who compete with the unfavored purchasers or with customers of the unfavored purchasers in the resale of such products. The complaint further alleges, *inter alia,* that the effect of such discriminatory practices may be to injure, destroy or prevent competition with the favored purchasers.

The second complaint (issued in Docket No. 7496) charges Tri Valley with violating Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d), by paying advertising and promotional allowances to some customers without making such allowances available on proportionally equal terms to all other customers competing in the distribution of Tri Valley's products.

The evidence of record in the consolidated proceedings and the Commission's findings and conclusions thereon *prior to remand* are detailed at pp. 6-24 of the Commission's brief in No. 18,125. A number of these same matters are also summarized in the Court's opinion in the prior review proceedings, *Tri-Valley Packing Association* v. *Federal Trade Commission, supra.*

The first order entered by the Commission directed Tri Valley to cease and desist from engaging in certain practices violative of Sections 2(a) and 2(d) of the amended Clayton Act. R. VI, 578.[4] As shown *infra,* the present order of the Commission which Tri Valley now challenges,

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[4] In this suplemental brief as well as in the Commission's previously filed brief in No. 18,125, the Commission refers to the record before the Court in the following manner: "R." indicates the reproduced transcript of record. The Roman numerals indicate the volume, the Arabic numerals the pagination. This implements the explanation set forth in this brief in footnote 2, *supra,* respecting the nature of the consolidated record herein. See also the Commission's first brief in No. 18,125 at p. 1, n. 2. It should also be noted that the page numbers of the record which are referred to in this and the prior brief are found in that record in *red* at the bottom of each page.

while similar, contains certain limiting language not found in the prior order.

The prior review proceedings of this Court in No. 18,125

On appeal to this Court in No. 18,125, the Commission's prior order was reversed and the cause was remanded for further proceedings in accordance with the Court's opinion, *Tri-Valley Packing Association* v. *Federal Trade Commission, supra.* Although ruling in favor of the Commission with respect to a number of matters, the Court in its opinion set aside the Commission's findings and conclusions on the Section 2(d) charge and set aside the order of the Commission on both the Section 2(a) and Section 2(d) charges.[5] 329 F.2d at 710; see also R. XXIV, 2148 n. 1. In so remanding, the Court in its opinion directed the Commission to undertake further findings or consideration on three points. As summarized by the Commission in its opinion, the three points are (R. XXIV, 2148-49):

> (1) Whether or not a causal link existed between the seller's prices and the impact on customer competition, or more specifically, whether the goods were generally available in the so-called "California Street" market so that in turn a determination can be made on whether the injury was due to the price discrimination rather than the failure of the disfavored purchasers to take advantage of the opportunity to buy . . .; (2) the threshold issue of whether the prices allegedly met were competitive prices within the contemplation of the Section 2(b) proviso . . ., and (3) the question of the existence of evidence or sufficiency of such evidence as may exist in the record to support the Section 2(d), Clayton Act charge . . . .

[5] The original findings and conclusions issued by the Commission in connection with its first order are found at R. VI, 572-78; see also 60 F.T.C. at 1178-83. These findings, conclusions and order, however, are no longer pertinent for consideration in view of the issuance of new findings, conclusions and order by the Commission at the conclusion of the remand proceedings.

The Court's opinion did not prescribe the type of proceedings to be conducted in determining these questions, specify the further evidence which could be adduced, or limit the exercise of the Commission's discretion in reasonably carrying out the Court's directions.

The proceedings on remand before the Commission and its hearing examiner

Following this Court's disposition of the review proceedings in No. 18,125, the Commission, by its order of July 6, 1964, reopened the matter, remanded it to a hearing examiner "for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court," and directed the hearing examiner, upon completion of the further proceedings, to "file a revised initial decision based upon the record made prior to the remand and any additional evidence that may be received." R. XIX, 1561.

Thereafter, extensive prehearing conferences and related proceedings were held by the hearing examiner before scheduling further evidentiary hearings on remand. R. XIX, 1562-1675; R. XX, 1676-1732. In the evidentiary hearings on remand which commenced on January 27, 1965, additional documentary evidence was received and the testimony of fifteen witnesses for the Commission and one witness for Tri Valley was adduced. R. XXV, 2204-71; R. XXVI, 2272-2378; R. XXVII, 2379-2506; R. XXVIII, 2507-2639. Several of the witnesses had previously testified in the hearings held before remand. After the parties had rested their respective cases, the hearing examiner on February 3, 1965, closed the remand proceedings for the taking of testimony and reception of evidence. R. XX, 1733; R. XXVIII, 2634, 2635, 2639. The parties then submitted proposed findings and conclusions and supporting argument (R. XX, 1734-95; R. XXI, 1800-29, 1835-66).

Thereafter, the hearing examiner on April 15, 1965, issued his Initial Decision on remand, sustaining the Commission's charges that petitioner has violated Sections

2(a) and 2(d) of the amended Clayton Act, and he included in his initial decision an order to cease and desist. The decision contains detailed findings of fact and conclusions of law, together with specific references to the supporting testimony and exhibits in the record of the consolidated administrative proceedings before and after remand. (R. XXII, 1876-1935).[6]

Tri Valley noted its intention to appeal (R. XXII, 1937) and thereafter briefs were filed by the respective parties (R. XXIII, 1949-2012, 2015-64; R. XXIV, 2066-89), and oral argument was heard by the full Commission (R. XXIII, 2065; R. XXIV, 2090-2144).

On July 28, 1966, the Commission (with one of its members dissenting) issued a final order, together with an opinion, denying the appeal and adopting with certain modifications the initial decision on remand of the hearing examiner as the decision of the Commission (R. XXIV, 2145-68).[7]

The Commission's decision

The extensive findings of fact contained in the modified initial decision adopted by the Commission, and the questions raised with respect to them on this appeal, may be briefly summarized as follows:

First, the Commission found that Tri Valley discriminated in price between different purchasers (R. XXII, 1884-91; R. XXIV, 2149-50, 2168). A similar finding by the Commission in its original decision was affirmed by the Court, 329 F.2d at 700-702. The present finding rests upon the same evidence of discriminatory transactions considered by the Court in No. 18,125 and also upon additional discriminatory transactions found by the Commission. Tri Valley does not question the finding that it has discriminated in price between different purchasers, but does ques-

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[6] A typographical error in the Initial Decision was duly corrected on April 23, 1965. R. XXII, 1876.

[7] Commissioner Elman, who dissented, filed a separate opinion (R. XXIV, 2169-81).

tion the Commission's authority in the remand proceedings to make additional findings of price discriminations (pet. supp. br. pp. 17, 30-31). We answer petitioner's argument below at pp. 14-17, 34 n. 32.

Second, the Commission found that the effect of the discrimination may be to substantially lessen competition or to injure competition with the favored purchasers (R. XXII, 1891; R. XXIV, 2151). A similar finding by the Commission in its first decision was also affirmed by the Court in its prior decision, 329 F.2d at 702-703. Tri Valley does not question this finding, except that it does question the Commission's authority to incorporate new findings of price discriminations not contained in the previous decision reviewed by the Court (pet. supp. br. pp. 17, 30-31). We answer this argument below at pp. 14-17, 34 n. 32.

Third, the Commission found that the lower prices were not available to the unfavored purchasers (R. XXII, 1891-94; R. XXIV, 2151-58). This finding, which is responsive to the first issue which the Court directed the Commission to consider on remand, is discussed below at pp. 17-25.

Fourth, the Commission found that Tri Valley failed to meet its burden under the good faith meeting of competition defense provided by Section 2(b) of the amended Clayton Act, 15 U.S.C. § 13(b) (R. XXII, 1894-98; R. XXIV, 2159-2163). This finding, which is responsive to the second issue which the Court directed the Commission to consider on remand, is discussed below at pp. 25-31.

Fifth, the Commission found that Tri Valley did not grant or offer promotion payments or allowances on proportionally equal terms to all customers competing in the distribution of Tri Valley's products (R. XXII, 1898-1903; R. XXIV, 2164-67) as required by Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d). This finding, which is responsive to the third and final issue which the Court directed the Commission to consider on remand, is discussed below at pp. 31-38.

Based upon the findings summarized briefly above, the Commission issued an order to cease and desist. The order is identical to that issued by the hearing examiner, except

for the addition of certain limiting language in paragraph two, *viz.,* the phrase "pursuant to a specially tailored or negotiated arrangement." R. XXIV, 2146-47. The reasons for the inclusion of this phrase are discussed in the Commission's separate opinion, R. XXIV, 2167. See also Point V of the Argument, *infra.*

The Commission's order on remand likewise differs from the broader order to cease and desist entered by the Commission *prior* to remand since the first order did not include this limitation.[8] Compare R. VI, 578.

On September 6, 1966, Tri Valley filed its petition for reconsideration of the Commission's decision, alleging that the decision raised new questions which Tri Valley had no opportunity to argue (R. XXV, 2182-97). After counsel supporting the Commission's complaint filed an answer in opposition (R. XXV, 2198-2201), the Commission (with Commissioner Elman dissenting) denied the petition on September 23, 1966, in an order setting forth both its ruling and supporting views (R. XXV, 2202-03).

The pertinency to the instant case of the decision of the Supreme Court and the Modified Final Decree of this Court in *Fred Meyer*

In the prior proceedings in No. 18,125, this Court ruled, *inter alia,* that Section 2(d) of the Clayton Act, as amended, does not apply if the favored and the disfavored buyers compete on different "functional levels," *e.g.,* if one is a wholesaler and the other a retailer. *Tri-Valley Packing Association* v. *Federal Trade Commission, supra,* 329 F.2d at 709. This particular question as to the scope of Section 2(d) had not been decided by the Commission in the Com-

[8] The Commission's prior order also referred to the petitioner herein (respondent in the Commission proceedings) as Tri-Valley Packing Association while the orders on remand entered by the Commission and its hearing examiner refer to petitioner by its present name, Tri Valley Growers. By stipulation, the complaint issued by the Commission in this cause has been amended to incorporate this change of name (R. XXVII, 2397-98). "This change of name," as petitioner herein confirms (supp. br. p. 1 n. 1), "does not in any way affect the matters before the Court for decision."

mission proceedings held prior to remand, since the Commission viewed the case as involving customers competing on the same functional level (see R. VI, 572-587). Disagreeing with the Commission, this Court in No. 18,125 concluded that different functional levels were involved as to some of the favored and disfavored buyers and found it necessary to reach the question which the Commission had not considered and which, consequently, had not been briefed or argued by the Commission in this Court.

A year prior to this Court's decision in *Tri-Valley*, however, the Commission had squarely decided this question in a related proceeding styled *In the Matter of Fred Meyer, Inc.*, Docket No. 7492, 63 F.T.C. ——, Trade Reg. Rep. [1961-1963 Transfer Binder] ¶ 16,368 (FTC 1963). The cease and desist order entered by the Commission in *Fred Meyer*, including the issue of the Commission's construction of Section 2(d), was awaiting review in this Court in the case of *Fred Meyer, Inc.* v. *Federal Trade Commission*, No. 18,903, at the time of the briefing, argument and decision in the *Tri-Valley* case, No. 18,125. Further, the *Fred Meyer* case involved, among other things, the same transactions under review in this case respecting Tri Valley and Fred Meyer, Inc. This Court, however, declined in *Fred Meyer* to reconsider its ruling in *Tri-Valley* with respect to the Section 2(d) question, explaining in part that "the issue was considered and considered at length" and "we are not inclined after so short a time to re-examine that decision . . ." *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351, 363 (9th Cir. 1966).

On the appeal of this Court's decision in *Fred Meyer*, the Supreme Court reversed the judgment of this Court, "insofar as it held that the promotional allowances granted Meyer by Tri-Valley and Idaho Canning did not violate § 2(d)," and remanded the case for further proceedings, consistent with the former's opinion. *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 358 (1968). As the Supreme Court stated in part (390 U.S. at 357):

> We conclude that the most reasonable construction of § 2(d) is one which places on the supplier the respon-

> sibility for making promotional allowances available to those resellers who compete directly with the favored buyer.

And, further (390 U.S. at 358):

> We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available to those who buy his products through wholesalers and compete with the direct buyer in resales.

In compliance with the remand directed by the Supreme Court and, in turn, this Court, the Commission on June 13, 1968, issued a modified order to cease and desist in its *Fred Meyer* proceeding consistent with the Supreme Court's construction of Section 2(d). On October 8, 1968, this Court issued a Modified Final Decree in No. 18,903, affirming and enforcing the latter order of the Commission. The decree is reproduced in the Appendix to this brief.

In the memoranda supporting several of Tri Valley's motions for extensions of time to file its supplemental brief herein, Tri Valley has advised the Court of the pertinency in the instant case of the issue as to Section 2(d) presented the Supreme Court for review in *Fred Meyer*. See petitioner's motion papers dated September 8, 1967, October 2, 1967, December 13, 1967, March 14, 1968, and April 17, 1968. In noting the question under review by the Supreme Court in *Fred Meyer,* Tri Valley twice informed this Court in part as follows:

> The grant of this writ [of certiorari] was limited to the following question or issue:
>
> > "1. Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Robinson-Patman Act."
>
> The question to be so reviewed by the Supreme Court in *Meyer* is closely related to some of the Section 2(d) issues involved in petitioner's present petition, and a

> decision thereon will in large part depend on the Supreme Court's construction of said Section. [P. 2 of each of the "Points And Authorities In Support Of Motion," which accompanied the respective motions of Tri Valley dated October 2 and December 13, 1967.]

Further, Tri Valley in its motion dated March 14, 1968, again sought to defer the filing of its supplemental brief until after the Supreme Court rendered its decision in *Fred Meyer*. Incorporating by reference the points and authorities filed in support of its motion of December 13, 1967, Tri Valley advised the Court in its motion of March 14, 1968, in part as follows:

> This motion is made on the ground that in the considered opinion of the parties the decision of the Supreme Court in said cause [*Fred Meyer*] can be dispositive of a number of the issues in this case. . . .

In its subsequent application dated April 17, 1968, Tri Valley advised this Court of a need for additional time to file its brief in view of the Supreme Court's decision in *Fred Meyer* on March 18, 1968.

Although Tri Valley's supplemental brief fails to discuss the Section 2(d) issues in the light of the Supreme Court's decision in *Fred Meyer*, Tri Valley through its counsel thereafter authorized the Commission's counsel to represent Tri Valley's view that the Court should consider on this appeal the effect of the latter decision as well as the aforesaid modified order of the Commission to cease and desist as recently affirmed and enforced by this Court's Modified Final Decree in No. 18,903. See p. 6 of the affidavit supporting the Commission's motion herein dated October 24, 1968, and p. 5 of the affidavit supporting the latter's motion herein dated August 1, 1968.

In the circumstances, the Section 2(d) issues merit consideration on this appeal in the light of the Supreme Court's opinion in *Fred Meyer* and the Commission's modified order to cease and desist as affirmed and enforced by the Modified Final Decree entered by this Court in No. 18,903. In this

connection, the Commission requests the Court to modify further the present cease and desist order in conformity with the Supreme Court's decision and this Court's Modified Final Decree in the *Fred Meyer* case. The further modification requested is set forth and further discussed under point V of the argument which follows.

ARGUMENT

I. The Commission properly adduced additional evidence and made additional findings with respect to the issues which were remanded for further proceedings.

A general objection which Tri Valley raises with respect to the Commission's present findings is that in receiving additional evidence on remand and in considering such evidence, the Commission acted inconsistently with the remand ordered by this Court (pet. supp. br. pp. 10-11, 16, 17-20). This objection is premised largely upon an erroneous view of the Commission's functions in connection with the "further proceedings" directed by this Court.

In view of the complexity of the matter and the extensiveness of the administrative record, it was patently reasonable for the Commission on remand to direct the hearing examiner to conduct such further proceedings as would seem appropriate to facilitate the determinations desired by the Court and to submit a new Initial Decision at the conclusion of those proceedings. Nor is there any impropriety in the fact that many of the findings contained in the Initial Decision (on remand) are essentially a recapitulation of findings made previously by the Commission and affirmed by this Court in the prior review proceedings. 329 F. 2d at 700, 701-02. We know of no authority—and none is cited by Tri Valley—precluding further discussion and recapitulation of findings in a subsequent administrative decision so long as they are not in conflict with the Court's mandate.

We submit that all of the findings adopted by the Commission are entirely consistent with the law of the case as

expressed by this Court in its opinion.[9] These findings were duly considered "in relation to the opinion of the court, and any discriminatory transactions enumerated are either those referred to by the court, or additional transactions consistent with the concepts of the Court of Appeals in entering its remand order." R. XXII, 1907.

Tri Valley ignores a major purpose for incorporating in the Initial Decision (on remand) the findings which in principle had been sustained by the Court. As indicated in that decision the hearing examiner received further evidence and entered those findings, in part, to "appraise the scope of the relief that should be granted, since the Court of Appeals in remanding the case had set aside the Commission's order with regard to the Section 2(a) charge." R. XXII, 1907. Since the question of relief, essentially injunctive in nature, would arise at the conclusion of the remand proceedings if the Section 2(a) charges were sustained, evidence and findings as to the extent of Tri Valley's pricing practices would become important in fashioning an appropriate cease and desist order. See this Court's opinion in No. 18,125, 329 F. 2d at 710. Furthermore, such additional evidence as was adduced was also pertinent in view of the obvious relationship between the evidence supporting the findings approved by the Court and the evidence respecting which this Court desired further clarification and findings. R. XXII, 1907.

A fair reading of the Court's opinion reasonably supports the interpretation of the Commission and its examiner that "[i]n permitting new findings as to the Section 2(a) charges, the Court of Appeals clearly indicated its intention that further evidence could be adduced if necessary." R. XXII, 1907. The Court's opinion, as noted in

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[9] The decision in *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529 (7th Cir. 1953), relied on by Tri-Valley (pet. supp. br. p. 31), is inapplicable here. There, certain findings were inconsistent with the law of the case and unrelated to the issues remanded to the "inferior tribunal" for resolution.

the Counterstatement of the Case, did not limit the Commission's discretion in reasonably carrying out the Court's directions as to further proceedings. Even if the Court's opinion could be viewed as posing some uncertainty as to whether the Court and its members actually "meant what we said or said what we meant," *Federal Trade Commission* v. *J. Weingarten, Inc.,* 336 F. 2d 687, 696 (5th Cir. 1964), *cert. denied,* 380 U.S. 908 (1965), the Commission's exercise of discretion in furtherance of "a system of justice dedicated to the objective of finding the truth" (*id.* at 696) was reasonable in the circumstances and not at variance with the Court's mandate.

In discharging its functions in the public interest and commensurate with due process considerations, the Commission is entitled to reasonable latitude in giving effect to the Court's directions. *Cf. P. Lorillard Co.* v. *Federal Trade Commission,* 186 F. 2d 52, 55 (4th Cir. 1950); *Federal Trade Commission* v. *J. Weingarten, Inc., supra.* And, "when a reviewing court finds legal error in an administrative order, the agency is not foreclosed upon the remand of the case from enforcing the legislative policy of the act it administers, provided the new order does not conflict with the reviewing court's mandate." *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 379 (1965), citing the decisions in *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 200 (1947), and *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940), which are also pertinent here.

The Commission's exercise of discretion in giving effect to the directed remand was entirely proper, as it "was not in disregard of the Court of Appeals' first mandate and was a good-faith attempt to incorporate the legal principles contained therein." *Federal Trade Commission* v. *Colgate-Palmolive Co., supra,* 380 U.S. at 383.[10] Tri Valley

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[10] Since the actions of the Commission upon remand involve the reasonableness of its procedures in carrying out the Court's mandate and not a question of power or "jurisdiction", Tri Valley's reliance on *Zdanok* v. *Glidden Co.,* 327 F.2d 944 (2d Cir. 1964), *cert. denied,* 377 U.S. 934 (1964), is misplaced. See *White* v. *Higgins,* 110 F.2d 312 (1st Cir. 1940).

not only had ample notice and opportunity to meet the evidence and contentions of complaint counsel but, as it concedes (pet. supp. br. pp. 19, 20), much of the evidence presented by complaint counsel was received without objection.

In the circumstances, it was unnecessary, contrary to Tri Valley's contentions (supp. br. pp. 3, 8, 11 and 20), for the Commission to apply to this Court for leave to adduce additional evidence with respect to the issues on remand in accordance with Section 11(c) of the amended Clayton Act, 15 U.S.C. § 21(c).[11]

II. Consistent with the remand directed by this Court in the prior review proceedings in No. 18,125, the Commission properly determined that the lower prices quoted by Tri Valley to certain favored purchasers were not in fact available to the unfavored purchasers as required by Section 2(a) of the amended Clayton Act.

In the prior review proceedings in No. 18,125, this Court specifically upheld the Commission's findings that Tri Valley discriminated in price between different purchasers and, further, that the effect of such discrimination may be to substantially injure, destroy or prevent competition between chain stores receiving the benefit of such discriminations and non-favored retailer purchasers and retailer customers of non-favored wholesaler purchasers. *Tri-Valley Packing Association, Inc.* v. *Federal Trade Commission, supra*, 329 F. 2d at 702. See also *In the Matter of Tri-Valley Packing Association, supra,* 60 F.T.C. at 1181.

The Court, while concluding that the evidence would support a finding of the requisite adverse competitive effect, noted that the Commission had not considered Tri Valley's

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[11] If, however, the Court now determines that the Commission in its endeavor to discharge its functions in the public interest has received and considered any evidence beyond that permitted by the Court's mandate, it is requested that this Court treat the instant brief as the request and showing contemplated by Section 11(c) of that statute and, in lieu of a further remand, consider the entire record herein as if such request and showing had previously been made. No violation of Tri Valley's fundamental right to a fair hearing or of the statute itself would result from such procedure.

argument that the lower prices offered to favored purchasers in the "California Street" market were available to non-favored purchasers. The Court deemed this argument pertinent because, if true, it may establish a lack of causal connection between the price discriminations and any probable injury to non-favored purchasers. 329 F. 2d at 703-704. In ruling that the Commission should determine this question on remand, the Court explained in part (329 F. 2d at 704):

> While Tri-Valley presented before the Commission the factual basis upon which this argument is made, it did no more than suggest the legal question which it now urges concerning the necessity of a casual connection between price differentials and probable competitive injury. This may explain why the Commission did not deal with the problem in its opinion or findings. . . . Disposition of this question is dependent upon the facts pertaining to the availability, to nonfavored purchasers, of the low prices for Tri-Valley products on the "California Street" market, and the application of the law to those facts.

The Court then remanded the case "for further proceedings bearing upon the unresolved price discrimination question to which we have previously referred." 329 F. 2d at 706.

The record contains clear and convincing evidence establishing that the lower prices granted the large chain purchasers were *not* available to the unfavored purchasers.[12]

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[12] The question whether complaint counsel, as petitioner argues (pet. supp. br. pp. 17-18), or Tri Valley had the burden of going forward with evidence on this issue is not material here, since there is substantial evidence in the record to support the Commission's finding that the lower prices were in fact not available to unfavored purchasers. We submit, however, that as a matter of law the burden of at least going forward with evidence to prove the availability of its discounts was on Tri Valley, once proof of the discriminatory prices had been established. See the Initial Decision (on remand) as adopted by the Commission, R. XXII, 1892-93, and the Commission's opinion, R. XXIV, 2145.

The Commission's findings on this issue are amply supported by the testimony of Messrs. Walter Tewes, of Walkey Grocery Company;[13] Samuel Arshan, of Middlesex Foods, Inc.;[14] Walter Rohrs, of Middendorf and Rohrs;[15] and Russell Snyder, Tri Valley's assistant sales manager in 1957 and 1958.[16] Their testimony with reference to the availability issue has been fully summarized in the Commission's opinion and in the modified Initial Decision (on remand) adopted by the Commission (R. XXII, 1893-94; R. XXIV, 2145-46, 2155).

Additionally, the Commission and its examiner found that the unavailability of Tri Valley's lower prices to unfavored purchasers "is also apparent from the fact that Bushey & Wright, a broker with offices in San Francisco, represented both H. A. Marr, Denver, Colorado, and Hannaford Brothers Company, Portland, Maine, in the purchase of Tri Valley products and, nevertheless, these two purchasers consistently paid higher prices than Safeway and/or A & P." R. XXII, 1994. As the Commission and its examiner further found (R. XXII, 1894):

> Apparently, having a buying representative on "California Street" is no guarantee that a purchaser will receive the lowest possible price from a supplier. If it were a guarantee it would seem that the unfavored purchasers would seek a favorable price on the "Street" through their brokers. If the prices identified were actually sought through brokers, it is apparent that the brokers were unable to obtain the favorable price on the "Street". Either inference, contrary to the contention of the respondent [Tri Valley], must lead to the same conclusion.

In discussing further the unavailability of lower prices to Marr and Hannaford, even though these firms were repre-

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[13] R. XII, 1028-37; R. XXV, 2208-30.

[14] R. XII, 1065-71; R. XXV, 2230-53.

[15] R. XII, 1037-46; R. XXV, 2254-69.

[16] R. XV, 1290-1360; R. XVII, 1478-82; R. XXVII, 2418-78.

sented by this San Francisco broker,[17] the Commission said in its opinion (R. XXIV, 2158):

> A situation such as this where wholesalers were paying the higher discriminatory prices at the time they were represented by a broker on California Street, who incidentally was not instructed to quote the lower prices, clearly demonstrates that the lower prices were not in fact available to disfavored purchasers.

It is significant that on remand both the Commission and its examiner found, contrary to Tri Valley's contention before the Commission, which it continues to urge here (pet. supp. br. p. 4), that there was no "California Street" market, as such, which is distinguishable from markets outside of California. R. XXII, 1896-97. The Commission in its opinion correctly noted that "[t]he record does not support respondent's [Tri Valley's] arguments about a California Street market. The main source of information on this claimed market and its prices is the indefinite and inconclusive testimony of respondent's assistant sales manager, Russell Snyder, which the hearing examiner apparently gave little weight." [18]

The Commission also noted that, as appears from Mr. Snyder's statements, the listings in the various trade and

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[17] This situation closely parallels that found violative of Section 2(a) in *In the Matter of Fruitvale Canning Company*, F.T.C. Docket No. 5989, 52 F.T.C. 1504 (1956), *petition for review dismissed per stipulation*, 9 Cir. No. 15,246 (January 30, 1957), and the same result should obtain here. In that case, another California canner (shown in the present record to be a competitor of Tri Valley) sold its goods at higher prices to certain buyers (wholesalers and others) who were represented by brokers than it sold like goods directly to certain large retail chain stores who bought through their own buying agencies located in San Francisco. Among the favored retail chains were Safeway, A & P, American Stores and First National Stores, all of whom are among the favored retail buyers in this proceeding.

[18] The Commission at this point quoted the testimony of Mr. Snyder before remand (R. XVII, 1508, 1509) and after remand (R. XXVII, 2453, 2454-55, 2456, 2457).

financial journals did not mention specific transactions but only the "general pricing level" of California Street. "It was not explained how this would inform the prospective purchaser that Tri Valley's goods were available at such prices and, in fact, the listing of the general pricing level would not necessarily mean the respondent was selling at those prices. Neither would this necessarily mean that a particular purchaser could obtain the goods from respondent at such prices." R. XXIV, 2155.

The Commission further noted that "[w]hether or not a prospective purchaser could have informed himself as to the 'general pricing level' in California, it is clear that the unfavored purchasers had not heard of so-called California Street prices." R. XXIV, 2155.[19]

Consistent with the findings contained in the Initial Decision (on remand) as modified and adopted by the Commission, the latter stated in its separate opinion (R. XXIV, 2155-56):

> We conclude, on the basis of this record, that the California Street market is not a regular exchange, and that it apparently is no more than a location for individual buyers—mostly chain stores—who enter into their own private agreements with the various California canners. Further, so far as the favored customers were concerned, it made no difference whether the purchaser was located on the Street or off the Street. If the lower preferential prices were available to the unfavored customers, as asserted, they could only have been available on the basis of possible dealings with the respondent [Tri Valley], directly or through a broker, aside from any so-called California Street market transactions.

In determining the unobtainability by unfavored buyers of Tri Valley's lower prices, the Commission noted Tri

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[19] The Commission at this point quoted, as an example, certain testimony of Mr. Tewes (R. XXV, 2218) and correctly observed that "[o]ther witnesses in the trade testified to the same effect." R. XXIV, 2155.

Valley's concession that it did not "through its price lists, invoices, brokers, or employees, give any information to these wholesalers [unfavored customers] regarding prices prevailing on 'California Street' "; observed the absence of evidence in the record that Tri Valley would have given its lower prices to the unfavored buyers upon request; and referred to evidence in the record of special price lists for Safeway and First National Stores (both of whom are favored customers of Tri Valley) and testimony to the effect that "favored chains were notified as to the availability of these prices, lower than contemporaneous list prices, and that other customers were not so notified." R. XXIV, 2156-58.[20] The Commission correctly found that Mr. Snyder's testimony prior to remand (R. XV, 1318-19) also "makes plain that the lower prices were tailored to the requirements or demands of the favored chains." R. XXIV, 2157. Further, as reflected by the Initial Decision (on remand) as adopted by the Commission, Tri Valley did not undertake through its price lists or otherwise to advise its customers that better prices were available on "California Street." Indeed, the price lists issued by Tri Valley made no mention of "California Street" prices. R. XXII, 1893-94.

The Commission and its examiner properly concluded from the record that "[t]he low prices so obtained were clearly a result of the buying power of the chain stores, and it would be wholly unrealistic to hold that such prices were available to the smaller purchasers." R. XXIV, 2158.

Tri Valley's view of the record and the "inferences" it would draw therefrom are predicated in large measure upon an unwarranted concept of the extent a seller's goods must be made available under Section 2(a). In effect, Tri Valley asserts that unavailability can be established only when the unfavored purchasers aggressively seek the lowest possible prices, either through haggling, coercion or other means, and thereafter it is shown that such purchasers

[20] As examples, the Commission specifically referred to the two special price lists (Commission Exhibits 223 and 225) and certain testimony of Mr. Snyder at R. XXVIII, 2607.

paid a higher price than their competitors on goods of like grade and quality. It is clear, however, that the extraction of discriminatory prices by such methods is precisely the kind of conduct that Congress in enacting the amended Clayton Act sought to proscribe.[21] See *R. H. Macy & Co., Inc.* v. *Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964); *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351, 363 n. 12 (9th Cir. 1966). Acceptance of Tri Valley's views on availability would ultimately result in the chains enhancing their already dominant position at the expense of the remaining wholesalers and independent firms. In carrying out the evident legislative intendment of Section 2(a), sellers should be required to make known to the entire trade the terms and prices under which they would sell their goods so that *legitimate* "bargaining" will not be encumbered by secret deals involving rebates, price reductions and other forms of price concessions to some but not all purchasers, as found in the instant case.

We submit that such inferences as the Commission has drawn are amply supported by the record herein and are consistent with the amended Clayton Act read in the light

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[21] In rejecting Tri Valley's claim that the buyer should keep abreast of the market quotations and seek out the lowest prices, the Commission stated: "Such a position on 'availability' does not accord with the view of that term or concept under Sections 2(d) and 2(e) of the amended Clayton Act. There the term 'available' has been interpreted to require some form of notification to the customer. *In the Matter of Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059 (1957); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F.2d 480 (2d Cir. 1962)." R. XXIV, 2156, n. 2.

The Commission also observed in its opinion that "the broad design and purpose of the amended Clayton Act was to protect the small independent against the enormous purchasing power of the large chains. Individual negotiations, like those shown here with the chains, would not be practical for the unfavored group. The smaller independents and many wholesalers are not equipped and they do not have the resources to bargain on the same footing as the large chains. To construe the Act so as to require bargaining as a basis for price equality would be to deny the protection of the Clayton Act to small customers." R. XXIV, 2158.

of its legislative history. The "inferences" or, more accurately, speculation asserted by Tri Valley throughout its argument ignores much of the record and would require a construction of the amended Clayton Act in a manner incompatible with the legislative intendment.[22] Even if the "inferences" favored by Tri Valley also found some significant support in the record, we submit that they would not be controlling here, for the reasons and on the basis of the authorities set forth in the Commission's first brief (filed in No. 18,125), at p. 31 n. 12.

Attempting to excuse its admittedly discriminatory pricing activities, Tri Valley further argues (pet. supp. br. pp. 22-23) that "the direct and proximate cause of probable injury to competition was the system of doing business on California Street and not Petitioner's discriminations" and suggests that the Commission should have found that others are to blame for that situation. Essentially, Tri Valley is contending that since others are engaged in similar activities, the Commission should not single out Tri Valley for corrective action. But see *In the Matter of Fruitvale Canning Co., supra.*

These contentions, however, are irrelevant here. First, the Court has already decided in the prior review proceedings that Tri Valley's price discriminations had some measurable impact on resale prices. *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d at 703. Second, the fact that "everybody is doing it" has long been held neither to constitute a defense by one engaged

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[22] The majority of the Commission, contrary to Tri Valley's innuendo (supp. br., p. 21), drew no inferences from the findings or investigation by a congressional subcommittee, *viz.*, Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives which issued a report entitled "Small Business Problems in Food Distribution." H. Rep. No. 2234, 86th Cong. 2d Sess. (1960). The authorities relied upon by Tri Valley (supp. br. p. 5 n. 5) do not permit this Court to "look beyond the record and take judicial notice of the proceedings and report of the Subcommittee," as now requested by Tri Valley. While Tri Valley requested the Commission officially to notice such proceedings and report (R. XIV, 1173-77), it is clear that Tri Valley's request was properly denied. In any event, Tri Valley is hardly aided by the portions of the proceedings and report on which it relies.

in the same activities nor to require the Commission to seek corrective action against others. See, *e.g.*, *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648 (1950); *Federal Trade Commission* v. *R. F. Keppel & Bros.*, 291 U.S. 304, 312-13 (1934); *Hills Bros.* v. *Federal Trade Commission*, 9 F. 2d 481, 485 (9th Cir. 1926).[23]

III. Consistent with the remand directed by this Court in No. 18,125, the Commission properly determined that Tri Valley has failed to show that its lower prices were made to meet equally low prices of competitors within the meaning of Section 2(b) of the amended Clayton Act.

The Commission's disposition of the second issue on remand, which pertains to the Section 2(b) defense asserted by Tri Valley, fully comports with this Court's mandate in No. 18,125, and is amply supported by the record. The Commission succinctly summarized the Court's directions on this issue, as follows (R. XXIV, 2159):

> The second issue upon which the court remanded this matter concerns the Section 2(b) defense and the stated "threshold" issue of whether or not Tri-Valley is engaged in meeting competitive prices within the meaning of the Section 2(b) proviso. Stated otherwise, it seems that the question is whether the alleged meeting of the so-called California Street market prices was in fact meeting "an equally low price of a competitor," *i.e.*, a response to individual competitive demand rather than the meeting of prices on a systematic basis not contemplated by the proviso. *Cf. Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 401 (1958).

The Commission, considering the Court's reasons for remanding, expressly construed the Court's mandate as making it "incumbent" upon the Commission to determine not only whether Tri Valley's price discriminations were

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[23] See also p. 6, n. 3 of the Commission's brief in No. 18,125, wherein somewhat similar contentions of Tri Valley are treated.

made pursuant to or to meet an illegal pricing system, but also whether Tri Valley's proof of meeting individual competitive demands satisfies the basic requirement established by the Supreme Court in *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 759 (1945) (R. XXIV, 2161).[24] The requirement laid down in *Staley* is that a seller, "who has knowingly discriminated in price", must show the existence of facts "which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." 324 U.S. at 759.

The Commission found on remand that while Tri Valley "consistently discriminated in favor of chain store buyers, the record does not support a finding that either [Tri Valley] or its competitors were selling pursuant to a pricing system" (R. XXIV, 2160). In resolving the further question posed by the Court's remand, namely, whether Tri Valley's lower prices were in response to individual competitive demands, the Commission further held on the basis of the entire record, including the evidence adduced on remand, that Tri Valley had not sustained its burden, as defined in *Staley, supra,* on this question (R. XXIV, 2145-46, 2159-63; R. XXII, 1894-98, 1908-11).

Tri Valley argues that since the Commission did not question Tri Valley's evidence that it was meeting competitive prices in the original proceeding, it is now precluded from doing so in the remand proceedings (pet. supp. br. pp. 10-11, 25-29). This evidence consisted chiefly of the undocumented statements of Tri Valley's assistant sales manager that Tri Valley's price discriminations were made to meet the prices of its competitors (R. XXIV, 2161-62; R. XXII, 1895-97). Tri Valley's argument, however, misunderstands both the scope of the Commission's functions on remand and the Commission's reasons for now finding Tri Valley's proof insufficient.

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[24] It cannot be doubted that the seller has the burden of sustaining a Section 2(b) defense. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231 (1951); *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746 (1945). See also the discussion and additional authorities found at pp. 39-41 of the Commission's brief in No. 18,125.

First, this Court on the appeal from the original Commission's decision never considered the question whether Tri Valley had sustained its burden under Section 2(b) of meeting individual competitive demands, because it desired the Commission to pass first upon the "threshold" question of whether Tri Valley was meeting prices on a systematic basis or was responding to individual competitive demands. 329 F. 2d at 706. It was thus entirely proper for the Commission on remand to reappraise Tri Valley's proof on meeting competition in light of the additional evidence introduced in the remand proceedings (*supra,* pp. 14-17).

Secondly, the Commission in its decision has fully given its reasons for now finding that Tri Valley has not sustained its burden with respect to meeting competitive prices. The Commission pointed out (R. XXIV, 2162) that while the hearing examiner in his first initial decision found on the basis of evidence adduced by Tri Valley that the latter was meeting a market price, he also found that the evidence was insufficient to establish that the discriminatory prices were to meet individual competitive situations. Subsequent to the remand, the same hearing examiner again held that respondent's proof was not adequate to show that its price reductions were made defensively to meet the prices of competing sellers in specific transactions. No finding was made this time, however, that Tri Valley was nevertheless meeting a market price.[25]

The Commission agreed with the conclusion of the examiner as to the inadequacy of Tri Valley's proof on meeting

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[25] As the Commission observed (R. XXIV, 2162): "Testimony adduced by respondent after remand in support of its argument that California Street prices were universally available, *i.e.*, that anyone 'could buy merchandise on the general market levels as cheaply as California Street, anywhere in the country', tends to distort the 'California Street' market concept originally presented by respondent in support of its argument that it was required to sell at lower prices to meet the price level in the California Street market. In view of this testimony and respondent's failure to present evidence as to the prices charged by its 'California Street' competitors, even though respondent asserted that these prices were carried in various publications, the hearing examiner quite understandably did not find in his second initial decision that respondent was meeting a market price."

competitive prices, since Tri Valley "failed completely" to satisfy its "burden of establishing that it was in fact acting defensively in response to lower prices of a competitor." As the Commission further noted in part, "[a]side from the self-serving statements that [Tri Valley] was a price follower and not a price leader there is nothing in the record to show that respondent's lower discriminatory prices were made in self-defense in response to competitors' prices or offers". R. XXIV, 2162.

Nor can it be doubted that the Commission and the examiner properly gave no weight to the unsupported self-serving *assertions* of Tri Valley's assistant sales manager in resolving the second remand issue, since "general testimony", without documentation or specific evidence, is insufficient to warrant a finding that a lower price was made in good faith to meet a competitor's equally low price.[26] (R. XXIV, 2163). See *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. 2d 212, 217 (7th Cir. 1944), *affirmed,* 324 U.S. 726 (1945); *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 758-759 (1945); *Cf. Continental Baking Co.,* FTC Docket 7630 (1963).[27]

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[26] "If it were," as the Commission has observed, "any seller who may be discriminating in price, including those who were not meeting competitors' prices, could successfully defend against a 2(a) charge simply by claiming that competition forced them to discriminate" (R. XXIV, 2163).

[27] In deciding that Tri Valley has not sustained its burden of establishing that its lower prices were made to meet individual competitive prices, the Commission has not receded in any way from its holding in its first decision that a seller's affirmative duty under Section 2(b) requires the seller not only to prove that it reduced its prices in good faith to meet the equally low price of a competitor, but also to demonstrate the existence of facts which would lead a reasonable person to believe that the lower prices being met were lawful prices (see R. VI, 584-5). Since the Commission has now found, however, that Tri Valley has not established that it was meeting any individual competitive prices, there is clearly no need for the Commission to determine further whether Tri Valley has satisfied the burden of demonstrating that it had reason to believe the prices to which it was assertedly responding were lawful prices.

Tri Valley on this appeal, however, argues that there is "implicit" in the "awareness" of the San Francisco market conditions attributed to it (in the Commission's findings prior to remand) "the notion that it had exercised due care in ascertaining conditions in the market including competitors [sic] prices" and that further litigation of the matter is thus precluded (pet. supp. br. p. 27). Apart from the fact that such "notion" was not included among the specific findings made by the Commission prior to remand, Tri Valley's argument simply ignores the fact that the findings referred to dealt with the now discredited testimony of Mr. Snyder that Tri Valley was meeting competitive prices (*supra*).

Furthermore, since one having the "awareness" of market conditions including competitors' prices asserted by Tri Valley could also be well aware that it was not actually meeting in good faith specific lower prices of its competitor, Tri Valley's failure to present the requisite documentation or evidence to support the general testimony of its assistant sales manager, Mr. Snyder, becomes highly significant. Inasmuch as Tri Valley allegedly possessed such "awareness," it necessarily follows that Tri Valley would have presented documentation or supporting evidence as to its defensive meeting of specific lower prices of its competitors to satisfy its burden of proof under the Section 2(b) defense, if such documentation or specific evidence had been favorable to Tri Valley's claims. Therefore, far from being aided by findings or evidence of such "awareness" and even of "due care" or "diligence," Tri Valley's inexplicable silence respecting such documentation or specific evidence strongly militates against the conclusory assertions made on its behalf that it was defensively meeting in good faith specific lower prices of its competitors. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 154-155 (1923); *Kjar* v. *Doak*, 61 F. 2d 566, 570 (7th Cir. 1932).

The Commission, contrary to Tri Valley's broadside arguments (supp. br. p. 29), fully considered the testimony of Tri Valley's witness, Mr. Snyder, in deciding the second remand issue. As accurately reflected by the Commission's present findings and separate opinion, the sum total of Tri

Valley's evidence on the "threshold" issue consists of conclusory, self-serving statements that his company was meeting competitive market prices. His testimony, as noted, is general in nature and wholly unsupported by documentation or specific evidence as to the prices of competitors actually being met.

Mr. Snyder's testimony as to Tri Valley's general policy of meeting only competitive pricing practices is refuted by Commission Exhibits 223, 224 and 225 and the testimony adduced in connection therewith, showing that Tri Valley developed special price lists in dealing with two favored chain store purchasers. Tri Valley failed to present through Mr. Snyder or anyone else the particular competitors who had the same prices or lower prices contained in the special price lists. Additionally, Commission Exhibits 216, 217, 218 and 219, which Mr. Snyder was unsuccessful in explaining away, show that Tri Valley did not meet competitive prices with respect to the sale of tomato paste.

The evidence adduced before and after remand, as noted more fully under Point II of this argument, amply supports the findings of the Commission and its examiner that there was no "California Street market" as distinguished from markets outside of California. Mr. Snyder testified [28] generally that in certain (unspecified) instances customers may obtain lower prices if they weren't on "California Street" (R. XXII, 1896; R. XXVII, 2453). But no evidence was

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[28] And in language apropriate here, this Court observed in *Fred Meyer* (359 F.2d at 360-61):

> This instance merely points out two factors common to Commission proceedings and to our review of them. First, those witnesses in possession of the most enlightening evidences are usually representatives of respondents or potential respondents, who have an interest in revealing only what they must and in volunteering nothing. Second, application of the Commission's reserve of expertise to this sometimes painfully extracted testimony may produce conclusions, and valid conclusions, quite different from those which an uninitiated fact-finder might reach. And, of course, the Commission and its Hearing Examiner are closer to the facts than we are, and we cannot discount the justifiable effect which weak and evasive responses, apparent even on the face of this cold record, may have had on them.

introduced showing that Mr. Snyder's general description of "California Street" practices were followed by competitors. And, as previously noted, several wholesalers testified that they never heard of "California Street prices" until their appearance at the administrative hearing (R. XXIV, 1896).

It is submitted that the Commission and its examiner properly weighed the credibility of the witnesses[29] and were not arbitrary in refusing to place any credence in Tri Valley's Section 2(b) defense. These matters, therefore, are precluded from consideration upon judicial review. See the discussion and authorities contained at p. 31, n. 12, of the Commission's brief in No. 18,125.

IV. Consistent not only with the remand directed by this Court in No. 18,125 but also the Supreme Court's decision in the related case of *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), and the Modified Final Decree subsequently issued by this Court in that case, the Commission properly determined that Tri Valley has violated Section 2(d) of the amended Clayton Act.

The Commission and its examiner properly concluded on remand that Tri Valley has violated Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d), by paying advertising and promotional allowances to some customers without making such allowances available on proportionally equal terms to all other customers competing in the distribution of Tri Valley's products. It is not disputed that Tri Valley paid advertising and promotional allowances

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[29] In weighing the credibility of witnesses, the trier of the fact may consider the demeanor of the witnesses, the probability or improbability of their testimony, inconsistencies, patent omissions and discrepancies in their testimony, their interest in the outcome of the case and relationship to the litigants. This is true even if the testimony of the witness is uncontradicted. *Young Ah Chor* v. *Dulles*, 270 F.2d 338 (9th Cir. 1959); *Joseph* v. *Donover Company*, 261 F.2d 812 (9th Cir. 1958); *Seletos* v. *Commissioner of Internal Revenue*, 254 F.2d 794 (8th Cir. 1958). These standards, as reflected by the Commission's decision and the supporting record, were plainly followed in this case.

to Central Grocers, Inc., of Boston, Mass., and Fred Meyer, Inc. of Portland, Oregon, but to no others in those areas (pet. supp. br. pp. 12, 15).[30]

The Commission's findings and conclusions are consistent with the Court's mandate in No. 18,125, wherein the Court set aside the findings, conclusions and order of the Commission respecting the Section 2(d) violations but directed (329 F. 2d at 710):

> As we have remanded this cause for further proceedings with regard to other matters we think it appropriate to afford the Commission on such remand, the opportunity of calling attention to evidence presently in the record, or of producing additional evidence, which will overcome the present seeming or actual, lack of factual support for the section 2(d) charges as discussed above.

A. *The allowances to Central Grocers*

Tri Valley does not question the fact that it granted allowances to Central Grocers under an arrangement which had not been made available to Standard Grocery and Food Centre Wholesale Grocers, who were competitors of Central Grocers and purchased goods from Tri Valley at approximately the same period of time. Tri Valley does take issue (pet. supp. br. p. 32) with the Commission's finding (R. XXIV, 2166) that the allowance was given to promote a general line of products. It claims, without elaboration, that this finding is contrary to the evidence which shows that the payments were made on the number of cases of canned fruits purchased. However, as the Commission pointed out (R. XXIV, 2168), this finding is amply sup-

[30] The examiner's Initial Decision (on remand) contains specific findings and conclusions, together with references to the Court's opinion in No. 18,125 and the suporting evidence of record, sustaining the Section 2(d) charges (R. XXII, 1876-79, 1881-85, 1898-1903, 1911-1913, 1911-15). The factual findings and conclusions were essentially adopted in their entirety by the Commission which, in its separate opinion, has discussed the matter further (R. XXIV, 2145-47, 2146-67, 2168).

ported both by the testimony of Tri Valley's own official and by the stipulation of its counsel (R. XVIII, 1488-1489; XXVIII, 2531).

The controlling fact here is that Tri Valley's arrangement for the payment of allowances based on any product purchased from Tri Valley's *general line* was made available to Central Grocers but not to Standard Grocery, Food Centre Wholesale Grocers or, indeed, any other wholesaler in the Boston area in approximately the same period of time. As the arrangement contemplated the payment of allowances on Tri Valley's general line of products, the Commission properly considered the *particular* products purchased from Tri Valley by Central Grocers, Standard Grocery and Food Centre Wholesale Grocers as irrelevant. It is sufficient and undisputed that these three wholesalers in the Boston area were customers of Tri Valley at approximately the same time that the latter was making payments to Central Grocers under such arrangement. See *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, 50 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958).

Tri Valley fails to demonstrate the manner in which any finding allegedly "conflicts with the law of the case" (pet. supp. br. p. 32). Nothing in the Court's opinion in No. 18,125 supports Tri Valley's broad contentions. Unlike the situation with respect to the Section 2(a) charges, this Court not only vacated the order but also the findings and conclusions with respect to the Section 2(d) charges.[31] The Court thus made it clear that further findings must be made and additional evidence could be adduced with respect to the latter charges.

The Commission and its examiner, for the reasons more fully discussed in the findings (R. XXII, 1911-1913), properly viewed the Court's opinion in No. 18,125 as permitting

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[31] Many of the same arguments made under part I of this argument, *supra*, respecting the propriety of the Commission adducing further evidence and making further findings and the inapplicability of the law of the case doctrine likewise would apply here if Tri Valley's broad contentions as to the limited scope of the remand concerning the Section 2(d) charges were deserving of more serious consideration.

the Commission to adduce further evidence and make further findings in accordance with the criteria set out in the opinion at 329 F. 2d at 707-708. Surely, the Court's mandate did not proscribe the Commission from adducing further evidence regarding others who were not accorded allowances. This would include evidence respecting Food Centre Wholesale Grocers, a wholesaler in the Boston area, as well as "another retailer" (apparently Safeway Stores, Inc.) in the Portland area discussed below. *Zdanok* v. *Glidden Co., supra,* upon which Tri Valley relies (pet. supr. br. pp. 32-33), is clearly inapposite here.

B. *The allowances to Fred Meyer*

With respect to the Portland area, Tri Valley challenges the finding of discrimination against Safeway because of the failure to make available to the latter the allowances given to Fred Meyer, Inc., to promote the sale of Tri Valley's canned peaches, the product involved in Fred Meyer's coupon book program.[32] The finding is alleged to be deficient since "these customers did not buy petitioner's promoted products at approximately the same time" and inasmuch as "there is no evidence showing that market conditions had remained essentially the same dur-

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[32] The same transactions involving Tri Valley and Fred Meyer, as well as the latter's coupon book program have already been considered in the case of *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351, 362 (9th Cir. 1966), *rev'd in part,* 390 U.S. 341 (1968). There, the relationship between the free goods given Fred Meyer upon the redemption of the coupons was found so disproportionate as to render this portion of the promotion scheme a price discrimination under Section 2(a), while other aspects of the matter were considered with respect to the Section 2(d) violations. In the light of this Court's opinion in *Fred Meyer, supra,* 359 F.2d at pp. 361-362, as well as the authorities discussed, *supra,* in Point I of this argument, we submit that the Commission in the present case properly followed the Court's ruling in *Fred Meyer* as to the same matters. See the Commission's discussion of this matter in its opinion (R. XXIV, 2168). Contrary to Tri Valley's view (pet. supp. br. p. 31), *Morand Bros. Beverage Co.* v. *National Labor Board, supra,* does not require a different result.

ing the period that elapsed between Safeway's *last* purchase made on April 1, 1957, and Fred Meyer's promotional campaign which began on September 1 of that year." Pet. supp. br. pp. 32-33. Both Fred Meyer and Safeway were retail customers of Tri Valley who competed in the Portland area in the distribution of such peaches but Tri Valley neither offered nor paid promotional allowances on proportionally equal terms to Safeway in that area (R. XXII, 1898-1900; R. XXIV, 2166).

The salient facts are that both Fred Meyer and Safeway purchased canned peaches of like grade and quality from Tri Valley at approximately the same time that Tri Valley and Fred Meyer were *negotiating* on a contractual arrangement respecting the latter's *coupon book program* (Commission Exhibits 10, 11, 31-33). Noting the date of the coupon committee approval which is shown in Commission Exhibit 11 as February 27, 1957, the Commission properly found (R. XXII, 1900 n. 38):

> [I]t is apparent that negotiations between Tri Valley and Fred Meyer concerning participation in the 1957 coupon program occurred prior to the end of February 1957. Safeway was a customer of Tri Valley in the purchase of canned peaches from January through March of 1957, at about the time Fred Meyer was also a customer of respondent in peaches of the same grade and quality, and at the time when negotiations were under way for participation in the 1957 book program.

It is not significant that Fred Meyer's 1957 promotional campaign began in September of that year while Safeway's last purchase of canned peaches from Tri Valley occurred in April 1957. Since "here the sales are of single, fairly standardized item widely sold in the area, and recur frequently during the years involved," Tri Valley's contentions must fail. *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d at 357, distinguishing *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (2d Cir. 1958).

We submit that the Section 2(d) violations found by the

Commission are sufficient to sustain the Commission order.[33] Nonetheless, a further matter merits discussion here.

Although neither briefed nor even cited by Tri Valley, the latter has squarely placed in issue on this appeal the decision of the Supreme Court in the related case of *Federal Trade Commission* v. *Fred Meyer, Inc.,* 390 U.S. 341 (1968), *reversing in part,* 359 F. 2d 351 (9th Cir. 1966). We have shown, as more fully discussed in our Counterstatement of the Case, that that decision as well as the Modified Final Decree issued by this Court in that case are pertinent here and warrant reconsideration of this Court's prior ruling in No. 18,125, insofar as it requires a showing of functional competition with respect to the Section 2(d) violations. Indisputably, this matter is appropriate for review here. See *White* v. *Higgins, supra,* 110 F. 2d at 318.

In *Fred Meyer,* the Supreme Court held that it is not the wholesalers themselves, but their retailer customers, who are the seller's "customers" within the meaning of Section 2(d) and to whom the seller must make its promotional payments available.[34] In remanding the case "for further

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[33] The sufficiency of the Section 2(d) violations found by the Commission to support an order has in fact been admitted by Tri Valley's counsel, who stated (R. IX, 807-808):

> [I]t's my understanding of the case that theoretically proof of one or two violations is sufficient to sustain the Commission's charges, a prima facie case is made, and no rebuttal of that prima facie case is made, and for that reason I see nothing—it would be oppressive, it seems to me, Your Honor, if that's all the Commission need do, to take us all over northern Oregon, Washington, and other areas, in order to prove their case.

[34] In view of the Supreme Court's decision in *Fred Meyer,* the Commission has proposed to amend its published "Guides For Advertising Allowances and Other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act," 16 C.F.R. 240.1 *et seq.* The proposed amendments, together with a notice of opportunity to present written views, suggestions or objections, have been published, 33 Fed. Reg. 10616 (July 25, 1968). The written submissions received from interested parties are now under consideration by the Commission and its staff. A review

proceedings," that Court reversed the judgment of this Court "insofar as it held that the promotional allowances *granted Meyer by Tri Valley* and Idaho canning did not violate § 2(d)" (italics supplied). 390 U.S. at 358.

Significantly, the same transactions and essentially the same evidence respecting Tri Valley's participation in Fred Meyer's coupon book program were involved in the *Fred Meyer* case as in No. 18,125. This is reflected by the opinions and records in those cases. The findings and evidence in the present case include those reviewed in No. 18,125 [35] and, as noted, certain additional evidence. It would be anomalous, therefore, for this Court in this later proceeding to reach a result not in accord with that in the now concluded *Fred Meyer* case.

As the Commission has noted in its opinion after remand (R. XXIV, 2167):

> *There were other direct customers of Tri Valley purchasing products of like grade and quality at or about the same time such products were purchased by the favored customers receiving the special advertising or promotional allowances.* The court, however, as to the Boston area, ruled that such other customers, who in that instance were retailers, were not entitled to treatment comparable to that accorded Central Grocers, because they were not in functional competition with the wholesaler. (329 F. 2d at 709.) In regard to the Portland area, as noted above, the court similarly held that Hudson House, which is principally a wholesaler, was not in functional competition with Fred Meyer, the favored retailer. (329 F. 2d at 709-710.) [Italics supplied.]

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of the proposed amendments reflects that there are no inconsistencies in the positions being asserted on the Commission's behalf in this brief.

[35] Further, the Commission's brief in No. 18,125 at pp. 18-24, 59-63, sets forth and discusses in considerable detail the evidence and prior findings of the Commission respecting the Section 2(d) charges.

While the Commission's findings and conclusions after remand were necessarily drafted in the light of this Court's opinion in No. 18,125, we submit that the above italicized portion of the Commission's opinion finds ample support in the evidence of record and, in considerable part, the Initial Decision (on remand) as adopted by the Commission. Since violations of Section 2(d) have been established apart from the evidence disregarded by this Court in No. 18,125 prior to the *Fred Meyer* decisions, the Court need only consider the latter evidence for the purpose of appraising the scope of the relief sought by the Commission in the hereinafter proposed modification to the Commission's *present* order to cease and desist order, as discussed below under Point V of this argument.

V. The modified order proposed herein is reasonably related to the violations of law found by the Commission and conforms to the Supreme Court's decision in *Fred Meyer* and the Modified Final Decree subsequently issued by this Court in that case.

The Commission's present cease and desist order, as noted in the Counterstatement of the Case, differs from the one previously set aside by this Court in that it is narrower in scope with respect to the prohibition against Section 2(d) violations.

Recognizing that this Court in its opinion had expressed a need for limiting the order with respect to the Section 2(d) violations, the Commission in its opinion on remand directed a narrowing of the form of order for those violations. R. XXIV, 2167. Accordingly, paragraph 2 of the Commission's present order, which pertains to the Section 2(d) violations, proscribes, *inter alia,* "the paying or contracting for the payment of anything of value to or for the benefit of respondent" when made "pursuant to a specially tailored or negotiated arrangement." The latter phrase is not contained in the order set aside by this Court or the one subsequently recommended in the hearing examiner's Initial Decision (on remand). Compare R. VI, 578 and R. XXII, 1916-17 with R. XXIV, 2147.

The present order, therefore, is clearly more favorable to Tri Valley than the one set aside in No. 18,125 or subsequently recommended by the hearing examiner. Nonetheless, Tri Valley challenges the breadth and scope of the Commission's present order on the same grounds asserted in the prior review proceedings in this Court with respect to the first (and now superseded) Commission order. Tri Valley's objections (as incorporated by reference in its supplemental brief, at p. 33) are adequately disposed of at pp. 65-75 of the Commission's brief in No. 18,125 and, additionally, in the Commission's opinion on remand (R. XXIV, 2167) so as to obviate further discussion here.

Further modification of the Commission's present order, however, now is desired in the light of the subsequent decision of the Supreme Court in the related *Fred Meyer* case and the Modified Final Decree thereafter issued by this Court in that case (No. 18,903).[36] That decision as well as the subsequent Modified Final Decree in that case, as discussed in the Counterstatement Of The Case, has rendered inappropriate paragraph number 2 of the present Commission order in the instant case.

Section 11(d) of the amended Clayton Act, 15 U.S.C. § 21(d), provides that upon the filing of the record the reviewing court acquires exclusive jurisdiction of the matter. Since the record already had been filed herein when the Supreme Court ruled in *Fred Meyer*, the Commission has been without jurisdiction to modify the present order in accordance with that ruling or, indeed, the subsequent Modified Final Decree of this Court in that case. While the Commission thus has not been able to take formal action to modify the order, it has formally considered the matter and determined the form of modified order which it believes should be entered in this case. The modification desired by the Commission consists of adding to the present language of paragraph 2 of the order the phrase "including

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[36] The said Modified Final Decree, which sets forth the Commission's modified order to cease and desist order affirmed and enforced therein, is reproduced in the Appendix to this brief.

customers who do not purchase directly from respondent" so that the order after modification will read in its entirety as follows:

IT IS ORDERED that respondent, Tri Valley Growers, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.
2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent, pursuant to a specially tailored or negotiated arrangement, as compensation or in consideration for any services furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers of respondent, including customers who do not purchase directly from respondent, who compete in the distribution of such products with the favored customer.

It is requested that the Court modify the present order of the Commission as shown above.[37]

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[37] This request is similar to that made by the Commission in its brief in this Court in *Clairol Incorporated* v. *Federal Trade Commission*, No. 21,235, which involves issues as to Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d), and an appropriate modification of a Commission cease and desist order issued prior to the Supreme Court's decision in *Federal Trade Commission* v. *Fred Meyer, Inc., supra*.

CONCLUSION

Wherefore, the Commission's present order should be modified by the Court as requested and affirmed and enforced as so modified.[38]

Respectfully submitted.

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January, 1969

[38] "To the extent that the order of the Commission * * * is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission * * *." Clayton Act, Sec. 11(c). 38 Stat. 734, as amended July 23, 1959, 73 Stat. 243; 15 U.S.C. § 21(c).

APPENDIX

APPENDIX

Filed Oct. 8, 1968 Wm. B. Luck, Clerk

United States Court of Appeals for the Ninth Circuit

No. 18,903

Fred Meyer, Inc., et al., *Petitioners.*

v.

Federal Trade Commission, *Respondent.*

Modified Final Decree

This Court on July 1, 1966, pursuant to petition filed by petitioners herein, having issued its "Final Decree" modifying, and affirming and enforcing as so modified, the order to cease and desist issued against petitioners on July 9, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, Docket No. 7492"; and the Supreme Court of the United States on March 18, 1968, pursuant to petition filed by respondent, having issued its opinion and judgment remanding the case to this Court with instructions to remand it to the Commission for further proceedings in conformity with the opinion; and this Court on May 16, 1968, having issued its mandate remanding the case to the Commission for further proceedings in conformity with the opinion of the Supreme Court of the United States; and the Commission on June 13, 1968, in accordance with said mandate, having issued its modified order to cease and desist in conformity with the opinion of the Supreme Court, and on August 14, 1968, having certified to this Court a copy of said modified order to cease and desist, reading as follows:

> It Is Ordered that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., in connection with the offering to purchase or purchase by or on behalf of respondent Fred Meyer,

Inc., in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, in connection with any promotional scheme consisting of distribution of coupons, to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme, and discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is:

(a) below the net price at which such products of like grade and quality are being sold by such seller to any other purchaser with whom respondent Fred Meyer, Inc., competes, or with whose customer or customers said respondent competes and

(b) not a price differential which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which products are sold and delivered by such seller and

(c) not a price change in response to changing conditions affecting the market for or marketability of such products, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned and

(d) not a price made in good faith to meet an equally low price of a cempetitor of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are effected.

It Is Further Ordered that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives

and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., directly or through any corporate or other device in or in connection with any purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Inducing or receiving anything of any value from any supplier as compensation for or in consideration of advertising, promotion, or display services or facilities furnished by or through Fred Meyer, Inc., in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc., when respondents know or should know that such compensation or consideration is not being offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers, including retailer customers who do not purchase directly from such supplier, who compete with respondent Fred Meyer, Inc., in the sale of such supplier's products.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed by the Court that said modified order to cease and desist issued by the Commission on June 13, 1968, be and it hereby is, affirmed, that petitioners be, and they hereby are, ordered to obey and comply with said modified order, and that the aforesaid "Final Decree" issued by this Court on July 1, 1966, and it hereby is, henceforth superseded by this Modified Final Decree.

/s/ Gilbert H. Jertberg
/s/ Ben C. Duniway
/s/ Roger D. Foley

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